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N. Gregory Smith

Louisiana State University Law Center, greg.smith@law.lsu.edu

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Finality and Fairness in Grievance Arbitration: Whether Allegations of Unfair Representation Justify Termination of Arbitration

I. INTRODUCTION

The confluence of conventional notions of individual liberty and public policy in industrial relations is frequently turbulent. Perhaps the turbulence is most apparent when the interests of an individual employee flow counter to the interests of both management and organized labor. This circumstance may arise when the employee's union unfairly represents him in a grievance proceeding against management. In such a circumstance, the individual need for fair representation clashes with policies favoring exclusive union representation and adherence to grievance procedures outlined in the applicable collective bargaining agreement. This Comment will consider the clash as it has arisen at the arbitration stage of grievance proceedings, specifically concentrating on the question whether arbitration of a grievance should go forward when the grievant complains that his union has breached its duty of fair representation and conspired with management to deprive him of his rights under the collective bargaining agreement.

To set the stage for an analysis of this question, this Comment will consider the national labor policies involved in grievance arbitration, particularly focusing on the doctrine of arbitral finality and the "exhaustion of remedies" requirement. The nature of the duty of fair representation will be briefly considered, and case law relating to the question whether grievance arbitration should go forward when a grievant contends he is not being fairly represented will also be reviewed. Finally, the issue will be analyzed from the standpoints of law and policy in an effort to distill a reasonable resolution of the problem.

II. NATIONAL LABOR POLICY: DOCTRINAL REQUIREMENTS AND THEIR EXCEPTIONS

Over a period of several years, the evolution of national labor policy has produced two doctrines that have particular impact on the issue under consideration. One of these—the doctrine of arbitral finality—basically provides that arbitral awards are final and not subject to judicial view.¹ The other is the exhaustion of reme-

1. See Comment, *Judicial Deference to Arbitral Determinations: Continuing Problems of Power and Finality*, 23 U.C.L.A. L. REV. 936, 948-50 (1976).

dies doctrine. It provides that a grievant must exhaust his remedies under the collective bargaining agreement before bringing his grievance to the courtroom.² Each of these doctrines, the labor policies behind them, and their exceptions, will be considered in turn.

A. Finality

Most collective bargaining agreements provide for arbitral finality. Conclusiveness is generally expected even in the absence of any explicit agreement to that effect.³ This expectation clearly accords with section 203 of the Labor Management Relations Act, which provides that "[f]inal adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."⁴

If finality is to have any real meaning, arbitral awards should not be subject to judicial review. The strength of the doctrine in fact depends on judicial deference to arbitral determinations. Courts have generally supported the doctrine. In the seminal *Steelworkers Trilogy*,⁵ for example, the Supreme Court took a position hostile to judicial review of arbitration.⁶ In analyzing the issues involved in arbitral solutions to industrial disputes, the Court noted that "[a]rbitration is a stabilizing influence only as it serves as a vehicle for handling any and all disputes that arise under the agreement."⁷ The Court, therefore, ruled that the means chosen by the parties should be given "full play."⁸ "Full play" could be possible only if courts refrained from "usurping" the functions entrusted to the arbitration tribunal by the parties themselves.⁹

Although the principles of finality articulated in the

2. See Simpson & Berwick, *Exhaustion of Grievance Procedures and the Individual Employee*, 51 TEX. L. REV. 1179, 1185-1214 (1973).

3. See Comment, *Judicial Deference to Arbitral Determinations: Continuing Problems of Power and Finality*, 23 U.C.L.A. L. REV. 936, 948-49 (1976).

4. 29 U.S.C. § 173(d) (1970).

5. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960).

6. See Naffziger, *All Power to the Arbitrator: The Aftermath of the Steelworkers Trilogy*, *Collyer Wire and ENA*, 12 AM. BUS. L.J. 295, 296-99 (1975); Smith & Jones, *The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law*, 63 MICH. L. REV. 751, 751-61 (1965).

7. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567 (1960).

8. *Id.* at 566.

9. *Id.* at 569.

Steelworkers Trilogy are still powerful, there are several exceptional situations in which judicial review is permitted. Section 10 of the United States Arbitration Act¹⁰ catalogues grounds for the vacation of an arbitral award. Under the Act, finality is not a bar to review when the arbitration process has been infected by fraud, corruption, or partiality, or when the arbitrator has exceeded his power or has been guilty of misconduct prejudicial to the rights of any party.¹¹ An important judicial exception to the finality doctrine was recognized in the relatively recent case of *Hines v. Anchor Motor Freight, Inc.*,¹² where the Supreme Court ruled that if the union breaches its duty of fair representation to the grievant so as to undermine "the integrity of the arbitral process," the bar of finality is removed.¹³ The effect of this decision is to permit a grievant to sue his employer after an adverse arbitration award has been rendered if it can be proved that the union has breached its duty of fair representation.

The duty of fair representation is a concept that must be understood to appreciate the justification for this judicial exception to finality. But because the same exception is applicable to the exhaustion of remedies requirement, it will be helpful to consider that requirement before investigating the duty of fair representation.

B. Exhaustion of Remedies

Section 301(a) of the Taft-Hartley Act provides for the filing in federal courts of "[s]uits for violation of contracts between an employer and a labor organization."¹⁴ While the provision on its face allows breach of contract actions to be brought by either the union or management, it is not clear whether this language gives an individual employee the right to sue his employer for an injury. One section 301 ambiguity was resolved in *Smith v. Evening News Association*¹⁵ when the Supreme Court ruled that the words "between an employer and a labor organization" modified "contracts" instead of "suits."¹⁶ But the Court did not deal with the critical question of standing: Whether the employee in that

10. 9 U.S.C. § 10 (1970).

11. *Id.*; see Comment, *Judicial Deference to Arbitral Determinations: Continuing Problems of Power and Finality*, 23 U.C.L.A. L. REV. 936 (1976).

12. 424 U.S. 554 (1976).

13. *Id.* at 567.

14. 29 U.S.C. § 185(a) (1970).

15. 371 U.S. 195 (1962).

16. *Id.* at 200.

case could sue under the collective bargaining agreement.

An answer to the standing question was suggested three years later in *Republic Steel Corp. v. Maddox*.¹⁷ In *Maddox*, a grievant brought an action in state court against his former employer for severance pay that he claimed was due him under the terms of the collective bargaining contract. The grievant had made no attempt to utilize a three-step grievance procedure before bringing the court action. The Supreme Court reversed the state court decision in favor of the grievant, holding that individuals asserting grievances under a collective bargaining agreement must attempt to use the contractual grievance procedures before seeking judicial resolutions of their grievances. "[U]nless the contract provides otherwise," said the Court, "there can be no doubt that the employee must afford the union the opportunity to act on his behalf."¹⁸ Since the grievant had not attempted to use the grievance procedure, he was denied access to the court.

In promulgating the requirement that a grievant must attempt to exhaust contractual remedies before seeking judicial assistance, the *Maddox* Court stood behind the notion of exclusivity of contractual grievance procedures. "If a grievance procedure cannot be made exclusive," observed the Court, "it loses much of desirability as a method of settlement."¹⁹ Exclusivity, it said, would promote union prestige with its members and would serve the employer's interest by limiting the choice of remedies available to aggrieved employees. In short, exclusivity would promote stability in labor-management relations.²⁰

The *Maddox* Court did allow for exceptions to its "attempt" rule. An employee's suit would not be barred, of course, if the collective bargaining agreement created a nonexclusive grievance procedure.²¹ The Court also suggested that if an employee found it impossible to use contractual grievance procedures, the attempt requirement would not apply.²² Additionally, the Court raised the possibility that other forms of redress might be available if the union refused to press, or only perfunctorily pressed, the individual's claim.²³

Since *Maddox*, the attempt rule has more clearly become an

17. 379 U.S. 650 (1965).

18. *Id.* at 653 (footnote omitted).

19. *Id.*

20. *Id.*

21. *Id.* at 657-58.

22. *See id.* at 659.

23. *Id.* at 652.

exhaustion requirement.²⁴ Generally speaking, the rule has developed that an employee who fails to exhaust all grievance steps, including arbitration, should not be entitled to sue.²⁵ Exceptions to the exhaustion requirement have also undergone development since *Maddox*. One of the most important of these exceptions is one that is also applicable to the finality requirement: suit is allowed if the union breaches its duty of fair representation. The next section will deal with this duty, focusing particularly on how its breach constitutes an exception to the exhaustion requirement.

C. *The Duty of Fair Representation*

While increased union strength has generally improved the worker's position with respect to management, it has tended to weaken his position with respect to the union itself. It has become more difficult for the worker to challenge the union from within.²⁶ The duty of fair representation is a judicial doctrine developed to help remedy the inequities occasionally attending the union's power as an exclusive bargaining agent.²⁷ Under this doctrine, it is not enough that the union merely represent employees in a confrontation with management—it must represent them fairly.

The doctrine of fair representation is said to have been first applied in the 1944 case of *Steele v. Louisville & Nashville Railroad*²⁸ to prevent a union from amending a collective bargaining agreement to exclude black employees from railroad work.²⁹ The Supreme Court found that the Railway Labor Act provision³⁰ which permitted the election of an exclusive bargaining agent also required a corresponding duty to protect the interests of every employee within the represented craft.³¹

Although *Steele* was decided under the exclusive representation provisions of the Railway Labor Act, its rationale compelled

24. See, e.g., *Vaca v. Sipes*, 386 U.S. 171, 184 (1967).

25. See *Simpson & Berwick*, *supra* note 2, at 1186.

26. See Note, *The Duty of Fair Representation: A Theoretical Structure*, 51 TEX. L. REV. 1119, 1119-21, 1178 (1973).

27. See Flynn & Higgins, *Fair Representation: A Survey of the Contemporary Framework and a Proposed Change in the Duty Owed to the Employee*, 8 SUFFOLK L. REV. 1096, 1099 (1974); Note, *The Duty of Fair Representation and Exclusive Representation in Grievance Administration: The Duty of Fair Representation*, 27 SYRACUSE L. REV. 1199, 1199-1201 (1976). This exclusive status is a product of § 9 of the National Labor Relations Act, 29 U.S.C. § 159 (1970).

28. 323 U.S. 192 (1944).

29. See Flynn & Higgins, *supra* note 27, at 1101.

30. 45 U.S.C. § 152 (1970).

31. 323 U.S. at 202.

a similar result in *Syres v. Oil Workers Local 23*,³² which involved the exclusivity provisions of the National Labor Relations Act (NLRA). *Syres* dealt with a union attempt to create a racially discriminatory seniority system. The Supreme Court's refusal to permit such a scheme suggested that the duty of fair representation applied to the NLRA.³³

The evolution of the doctrine continued in National Labor Relations Board decisions³⁴ and court opinions,³⁵ but the most definitive statement of the duty appeared in the Supreme Court's decision of *Vaca v. Sipes*.³⁶ *Vaca* involved a suit by an employee against his union for the union's alleged arbitrary refusal to take his grievance to arbitration under the procedures of the collective bargaining agreement. The employee, Owens, had been discharged on the ground of poor health. During the fourth step in the grievance procedures,³⁷ the union sent him to a physician for a complete physical examination. Upon receipt of an unfavorable report from the physician, the union decided not to take the grievance to arbitration.³⁸ Owens sued the union for "arbitrarily, capriciously and without just or reasonable reason or cause" refusing to proceed further.³⁹

The ultimate question presented in *Vaca* concerned the remedies available to an employee when his employer breaches the terms of the contract and his union refuses to invoke grievance procedures on his behalf. The Court answered the question by holding that the employee will be excused from the exhaustion of remedies requirement and will be permitted a judicial resolution of his grievance upon proving that his union's refusal to invoke the grievance procedures was in breach of its duty of fair representation.⁴⁰ The Court also articulated a standard for testing al-

32. 350 U.S. 892, *rev'g per curiam* 223 F.2d 739 (5th Cir. 1955).

33. See Flynn & Higgins, *supra* note 27, at 1102.

34. See, e.g., *Independent Metal Workers Local 1*, 147 N.L.R.B. 1573 (1964) (union certification revoked where union practiced segregation and discriminated on the basis of race in determining eligibility for full membership); *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962) (union's arbitrary demotion of employee was unfair labor practice), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963).

35. See, e.g., *Humphrey v. Moore*, 375 U.S. 335, 350 (1964) (union's broad authority as bargaining agent is accompanied by duty of fair representation).

36. 386 U.S. 171 (1967).

37. The fifth and final step was arbitration. *Id.* at 175 n.3.

38. *Id.* at 175. Some earlier medical reports had supported Owens' position. *Id.* at 174-75.

39. *Id.* at 173.

40. *Id.* at 186. This rule has been criticized as imposing too great a burden on an individual grievant. See, e.g., Flynn & Higgins, *supra* note 27, at 1108-09; Note, *The Duty of Fair Representation and Exclusive Representation in Grievance Administration: The*

leged breaches of the duty: "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith."⁴¹

To some extent, the Court's unwillingness to grant the individual employee "an absolute right to have his grievance taken to arbitration"⁴² reflects a theory of industrial relations developed by Professor Archibald Cox that places a premium on union control over grievance prosecutions.⁴³ In a discussion citing Professor Cox, the Court observed that a grievance settlement procedure giving the union discretion in invoking remedies eliminates frivolous grievances, promotes consistent treatment, and assists the resolution of contractual ambiguities. Moreover, "the settlement process furthers the interest of the union as statutory agent and as coauthor of the bargaining agreement in representing the employees in the enforcement of that agreement."⁴⁴ On the other hand, if the employee could compel arbitration over union objections, more grievances would go to costly arbitration and the employees' reliance on the union could be undermined.⁴⁵

Duty of Fair Representation, 27 SYRACUSE L. REV. 1199, 1200 (1976).

41. 386 U.S. at 190.

42. *Id.* at 191.

43. Professor Cox gives several "strong reasons for concluding that the bargaining representative ought to have power under a broad industrial agreement to control the prosecution of claims for breach of contract." Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601, 625 (1956). Paraphrased, his arguments are:

- (1) The union may be the only party qualified to prosecute the claim.
- (2) The group of employees may be affected by future implications of a grievance ruling to an extent that outweighs the individual claim for relief.
- (3) Many claims of contract violation affect employees other than those directly damaged.
- (4) Vesting grievance control in the union increases the likelihood of uniformity while it reduces the chances for discrimination and competition.
- (5) Competition between employee groups can promote plant unrest and deter the union from taking a responsible position.
- (6) The union can resolve conflicting interests among employees.

See *id.* He also lists several disadvantages to giving individual grievants sole right to prosecute claims:

- (1) It disregards established practice.
- (2) It exposes the grievant to a situation of unequal bargaining power.
- (3) It disregards group interests.
- (4) It compels tenuous line drawing between suits for individual damage and claims only the group can present.
- (5) It is contrary to the implications of NLRA § 8(a)(5).

See *id.*

44. 386 U.S. at 191.

45. Of course, the approach taken by the Court does not give the union absolute control over grievance proceedings. Indeed, the Court's effort in *Vaca* can be seen as one

Thus, it is clear from *Vaca* that an employee may escape the strict confines of grievance procedures and the exhaustion of remedies requirement if he can show that his union breached its duty of fair representation. Unanswered by *Vaca* is whether a grievant can compel a judicial resolution of his claim against management when the union continues to prosecute his grievance through arbitration, but prosecutes it in a manner that breaches the duty of fair representation. In short, can the grievant enjoin the arbitration proceeding by alleging a breach of the duty? This question has been discussed by several courts, but the judicial results have not been consistent. In order to suggest a possible consistent result, it will be useful to consider how courts have dealt with the issue.

III. EXHAUSTION OF REMEDIES AND THE ARBITRATION STAGE: THE CASE LAW

The earliest judicial decision articulating a clear stand on the issue was *Hiller v. Liquor Salesmen's Local 2*.⁴⁶ The case involved a complaint by the administrators of Louis Hiller's estate that the decedent had been unlawfully discharged from employment with the "knowledge, consent and connivance" of his union. The defendants moved in the district court for a stay pending arbitration, and the motion was granted. The issue was thus presented whether allegations amounting to a breach of the duty of fair representation⁴⁷ were sufficient to overcome the contractual provision requiring the arbitration of such disputes. The appellate court held that the allegations were sufficient, reasoning that

where the employee's case is based upon a conspiracy between his union and his employer to deprive him of his rights he cannot be forced to submit that issue to an arbitration between the employer and the union. Such a procedure would fail completely to settle the issues between the union member and his union. It would entrust representation of the employee to the very union which he claims refused him fair representation, and it would present as adversaries in the arbitration procedure the two parties who, the employee claims, are joined in a conspiracy to defraud him.⁴⁸

of attempting to balance competing interests of employer, union, and employee—with the duty of fair representation serving as the medium of balance. See Comment, *Protection of Individual Rights in Collective Bargaining: The Need for a More Definitive Standard of Fair Representation Within the Vaca Doctrine*, 14 VILL. L. REV. 484, 494 (1969).

46. 338 F.2d 778 (2d Cir. 1964).

47. *Id.* at 779.

48. *Id.*

If such a conspiracy prevents a fair representation of the employee's interests in arbitration, one possible solution would be to permit the employee himself to appear or be represented in the proceeding. Apparently, the lower court had approved of just such an arrangement in its order. The circuit court found the proposed solution to be inadequate:

[T]his arrangement fails to cure the defects, since the plaintiffs would still be aligned on the side of their adversary the union or, if not, the order would have to be construed as forcing the plaintiffs to arbitrate issues with employer *and* union which neither they nor their decedent ever agreed to arbitrate.⁴⁹

Having reached these conclusions about the effect of a breach of the duty of fair representation on arbitral fairness and the inadequacy of the lower court's solution to the problem, the Second Circuit reversed the order granting a stay of judicial action.

A similar approach on different facts was again used by the Second Circuit in *Desrosiers v. American Cyanamid Co.*⁵⁰ In that case, Desrosiers sued his former employer and union. He alleged that the employer's failure to transfer him to another job for medical reasons constituted a violation of the collective bargaining agreement. He charged the union with a breach of the duty of fair representation for its failure to assist him in seeking the transfer. Jurisdiction was sought, in part, under section 301 of the Labor Management Relations Act. An earlier action by Desrosiers had been dismissed because he had failed to use the grievance machinery. On this second attempt, the plaintiff alleged that a conspiracy between the union and his employer had deprived him of his rights. The lower court ruled against Desrosiers on a motion for summary judgment. The issue ultimately presented on appeal concerned the circumstances under which an individual employee "is required to exhaust grievance procedures provided by a collective bargaining agreement between his employer and his union before he may maintain suit in the courts to enforce rights under that agreement."⁵¹

The Second Circuit reversed the dismissal of Desrosiers' action. Noting that the "somewhat inartistically drawn" allegations of the complaint were sufficient to charge a breach of the union's duty of fair representation under *Vaca* and were similar to the charge made in *Hiller*, the court indicated that pursuit of a rem-

49. *Id.* at 779-80 (emphasis in original).

50. 377 F.2d 864 (2d Cir. 1967).

51. *Id.* at 867.

edy under the contractual grievance machinery might have been futile.⁵² This fact was enough for the action to survive a motion to dismiss—there were “genuine issues of material fact to be tried.”⁵³

In *Lusk v. Eastern Products Corp.*,⁵⁴ the Fourth Circuit reaffirmed the rule articulated in *Hiller* and *Desrosiers* even though the case was decided against the grievants. The plaintiffs in *Lusk* were opposed to a freezing of working shifts agreed to by the union and management. A grievance was presented to the company by the union on behalf of the dissatisfied employees, but nine days later the grievants filed a section 301 action. The district court stayed its own proceedings pending final arbitration. During the stay, the grievance was processed without resolution. Ultimately, arbitration was scheduled. The grievants were invited to attend the arbitration hearings, to participate in them, and to be represented by counsel.⁵⁵ The arbitrator’s decision was that the grievance was without merit. Following this decision, the district court granted motions by union and management to dismiss the plaintiffs’ complaint. On appeal, the plaintiffs complained, *inter alia*, that it was error to require them to submit to arbitration.

The Fourth Circuit first noted that it was “established that federal courts have jurisdiction under § 301 of the Labor Management Relations Act where a member of a union charges that his union breached its duty to fairly represent him by colluding with the company to deprive him of his rights.”⁵⁶ But, said the court, when allegations of a breach of the duty of fair representation are merely “conclusory,” they fail to state a valid claim.⁵⁷ The court determined that this was the case here, since no specific factual allegations supported the charges. However, the district court had dismissed the complaint, not for its conclusory nature,

but on the theory that plaintiffs were required to submit the subject of their complaint to arbitration, that all questions raised in plaintiffs’ complaint had been resolved adversely to plaintiffs by the arbitrator and that the arbitrator’s holdings were binding upon the court and upon plaintiffs.⁵⁸

52. *Id.* at 870-71.

53. *Id.* at 871.

54. 427 F.2d 705 (4th Cir. 1970).

55. *Id.* at 707. Counsel for the grievants did attend and participate, but announced that he would not “actually enter into the grievance process.” *Id.*

56. *Id.* at 708.

57. *Id.*

58. *Id.*

This holding, said the court, was incorrect.

The proper rule was declared by the court to be that articulated in the *Hiller* case.⁵⁹ But despite its adherence to the *Hiller-Desrosiers* rule, the court affirmed the lower decision, refusing to upset a correct result that was incorrectly reasoned.⁶⁰ The court did not discuss the advisability of including the grievants in the arbitration proceeding, but inasmuch as they were represented in the proceeding that occurred, the implication is that the court perceived that remedy as inadequate.

It should be noted that federal courts have not been alone in accepting the *Hiller-Desrosiers* rule. The Supreme Court of Oregon, for example, has clearly aligned itself with the approach of the cases discussed in this section. In *Wagner v. Columbia Hospital District*,⁶¹ that court was faced with a wrongful discharge action by a former employee who alleged that the discharge stemmed from a conspiracy between union and management to violate her civil rights. Both union and management had filed motions to abate the action and to require arbitration under the terms of the collective agreement. The motions had been granted, and the plaintiff appealed.

The court observed that in the "normal" situation, national labor policies would be served by not allowing arbitration to be frustrated by the bringing of court actions. But his approach, noted the court, is "based upon the assumption that the interests of the employee will be fairly represented by the union."⁶² When a conspiracy between union and management is alleged, however, that assumption fails. The court rejected the contention that the grievant must "utilize the grievance procedure to the point where she can claim the union did not give her fair representation as a condition precedent to her filing the lawsuit."⁶³ Instead, the court articulated the following rule:

[I]f the complaint of a discharged employee alleges facts from which it appears that the interests of the employee will not be fairly represented by the union in an arbitration proceeding, with the result that such a remedy would be useless and futile, a motion to abate such proceedings . . . to require the employee to submit his claim to arbitration . . . will be denied. In such a case the trial court must then proceed to determine, by trial if

59. *Id.*; see text accompanying note 48 *supra*.

60. 427 F.2d at 708.

61. 259 Or. 15, 485 P.2d 421 (1971).

62. *Id.* at 24, 485 P.2d at 425.

63. *Id.* at 27, 485 P.2d at 427.

necessary, whether plaintiff can prove the allegations of his complaint.⁶⁴

Under the facts of the case, the court determined that requiring arbitration to proceed would be futile and that the plaintiff could not expect fair representation of her interests by the union.⁶⁵

Several courts, however, have not followed the *Hiller-Desrosiers* rule. The most significant departure from that rule occurred in the recent case of *Hotel & Restaurant Employees & Bartenders International Union v. Michelson's Food Services, Inc.*⁶⁶ The *Michelson's* case featured a complaint by a grievant that the employer, Michelson's, had failed to pay over \$30,000 due him under a labor agreement. The grievant, Manning, initiated a grievance action by filing a written complaint with the union. When the union was unable to reach agreement with Michelson's in the first two stages of the dispute resolution procedure,⁶⁷ it demanded binding arbitration of the grievance. On the day of the arbitration hearing, Manning appeared with his attorney and accused the union of conspiring with Michelson's to deny him the compensation and insisted that the union could not fairly represent him. Manning's attorney requested that the union be joined as a defendant, that the arbitrator be empowered to grant compensatory and punitive damages against both defendants, and that Manning be allowed to represent the entire class of similarly situated employees. The union agreed to allow Manning and his counsel to direct the case, but Michelson's said it would not submit to arbitration unless Manning agreed to be bound by the decision, something that Manning refused to do.

When the parties were unable to reach agreement, the arbitrator took it upon himself to issue an interim award providing that (1) Manning would be designated as a party to the action and would be bound by the decision, (2) any other employees could be joined in the proceeding, and (3) punitive damages, costs, and attorneys' fees might be awarded against either the union or Michelson's. The union was directed to petition a court for enforcement of this award, and enforcement was sought in a California state court. Removing the case to federal district court,

64. *Id.* at 27-28, 485 P.2d at 427.

65. Other cases taking essentially the same approach include *Glover v. St. Louis-San Francisco Ry.*, 393 U.S. 324 (1969); *Smith v. Pittsburgh Gage & Supply Co.*, 464 F.2d 870 (3d Cir. 1972); *Sheridan v. Liquor Salesmen's Local 2*, 444 F.2d 393 (2d Cir. 1971).

66. 545 F.2d 1248 (9th Cir. 1976).

67. The collective bargaining agreement created a three-step dispute resolution procedure, with the final step being binding arbitration. *Id.* at 1250.

Michelson's opposed the petition. Finding that the arbitrator's award exceeded the scope of his authority, the district court denied enforcement.

Ruling on an appeal brought by the union, the Ninth Circuit reversed, holding that arbitration between the union and Michelson's should go forward with Manning as a party, but that the arbitration should be limited to Manning's grievance against Michelson's without provision for punitive damages. The court found nothing in the collective bargaining agreement that would allow arbitration of Manning's claim against the union. In response to the argument that the arbitration should not go forward when the grievant complains of union breach of the duty of fair representation, the court said that the federal policies involved in the arbitration of grievances should prevent the abortion of the proceeding, particularly when charges of the breach were first asserted at the arbitration stage of the dispute resolution procedure. In reaching its decision the court was forced to cope with the weight of contrary authority. Acknowledging the implications of *Hiller*, *Desrosiers*, *Lusk*, and *Wagner*, the court strained, rather unconvincingly, to distinguish the four cases. Ultimately, the court admitted that it was "quite impossible" to reconcile everything courts had said about the issue.⁶⁸ It further confessed that its determination that arbitration should proceed when the grievant complains of a conspiracy between labor and management was not a happy solution. Nevertheless, the court said it was a solution that comported with the spirit of judicial decisions defining national labor policies.⁶⁹

Another departure from the *Hiller-Desrosiers* rule may be found in the opinion of the Pennsylvania district court in *Aldridge v. Ludwig-Honold Manufacturing Co.*⁷⁰ In *Aldridge*, an employee brought suit against his employer for breach of the collective agreement with respect to his being laid off and later rehired at an inferior grade. He also sued the union for a breach of the duty of fair representation. The defendants moved for summary judgment on the basis that the plaintiff had failed to exhaust the grievance machinery. The court entered judgment for the defendants, ruling that any lower level union decision not to

68. *Id.* at 1254.

69. In this connection, the court referred to *Vaca v. Sipes*, 386 U.S. 171 (1967); *Humphrey v. Moore*, 375 U.S. 335 (1964); and the *Steelworkers Trilogy*, 363 U.S. 564, 574, 593 (1960). These cases articulate the view that grievance disputes are basically to be resolved by the collective parties outside of the courtroom.

70. 385 F. Supp. 695 (E.D. Pa. 1974), *aff'd*, 517 F.2d 1397 (3d Cir.), *cert. denied*, 423 U.S. 937 (1975).

prosecute a grievance must be appealed to a higher level within the union's grievance procedure before a judicial action could be brought. The grievant had not done so, but instead had alleged that there was a conspiracy between union and management. The court rejected the excuse, declaring that the policy of forestalling judicial interference with internal union affairs should not be circumvented when an employee alleges the existence of a conspiracy between union and management.⁷¹

IV. WEIGHING THE ALTERNATIVES

The foregoing review of judicial authority makes it apparent that several courts would permit a grievant to secure a stay of arbitration proceedings if he alleges the existence of a conspiracy between his union and management to deprive him of his rights. The obvious alternative approach to the problem is simply to permit arbitration to generate a result that can be judicially reviewed if the grievant establishes a valid ground for upsetting the award. This latter approach is basically what the *Michelson's* court chose—with the significant twist of sanctioning a tripartite arbitration proceeding to ensure representation of the grievant's interests. Each of these approaches will now be evaluated in an effort to define which solution, if any, is most satisfactory.

A. Stay of Arbitration

A basic justification for staying arbitration when the grievant alleges that the arbitral parties are conspiring against him is that, if the allegation is true, the resulting award will be essentially meaningless. In such a circumstance, the "adversaries" will really be allies, and the arbitrator will only be presented with those facts and those arguments that will point to a result desired by the conspirators. The result will not be reflective of the grievant's interests or of reality. Therefore, the argument goes, the arbitration should be stayed, pending proof of the grievant's allegation of conspiracy.

The major national labor policy that would be served by this solution to the problem is that the collective bargaining agreement should be enforced.⁷² A stay of arbitration, in this context,

71. *Id.* at 699. It is not clear from the opinion whether the court was influenced by what may have been the "conclusory" nature of the conspiracy allegation. As evidenced by the discussion in *Lusk*, a conclusory allegation will not pass muster in some courts. See note 57 and accompanying text *supra*. But see *Fiore v. Associated Transp., Inc.*, 255 F. Supp. 596 (M.D. Pa. 1966).

72. This has been termed the most important national labor policy underlying § 301

provides some assurance that the individual rights specified in the collective agreement will not be violated by a union-management conspiracy. Recourse to the courtroom will also permit the grievant to bring an unfair representation action against the union.⁷³ Continued arbitration, on the other hand, would not permit the grievant to satisfy his allegations against the union, at least not until after arbitration.⁷⁴

There are other reasons to favor a stay of arbitration as well. Certainly when an actual conspiracy exists, a termination of arbitration will prevent misuse of the arbitral process and loss of time and money in a futile proceeding. The difficulty with this argument, of course, is that these economic benefits are not realized unless a conspiracy is in fact established. If the grievant cannot demonstrate the existence of a conspiracy or breach of the duty of fair representation, the court cannot hear the section 301 action and the case must be resubmitted to arbitration. Inasmuch as it is no simple matter to prove a breach of the duty,⁷⁵ the economic argument for a stay of arbitration is not overwhelming.

Perhaps the most persuasive reason for permitting termination of arbitration when the grievant alleges the existence of a conspiracy is that his individual contractual rights will be most effectively supported by a stay. This focus on individual rights, however, seems to run counter to such basic collectivist notions as maintaining industrial peace, preserving union prestige in the bargaining unit, and promoting industrial self-government— notions underlying current national labor policy. By taking the grievance prosecution out of the established grievance machinery, it may be argued, all of these collective interests are impaired. These collective concerns, however, may be more relevant to the negotiating side of industrial relations than they are to the grievance side. In this sense, contractual disputes can be distinguished from grievance disputes.⁷⁶ In the former the interests of all union members and management are at stake, whereas in the latter the

of the Taft-Hartley Act. See Tobias, *Individual Employee Suits for Breach of the Labor Agreement and the Union's Duty of Fair Representation*, 5 U. TOL. L. REV. 514, 533 (1974).

73. See *Vaca v. Sipes*, 386 U.S. 171 (1967).

74. See *Hiller v. Liquor Salesmen's Local 2*, 338 F.2d 778 (2d Cir. 1964).

75. See Note, *The Duty of Fair Representation and Its Applicability When a Union Refuses to Process an Individual's Grievance*, 20 S.C.L. REV. 253, 267-69 (1968); Comment, *Post-Vaca Standards of the Union's Duty of Fair Representation: Consolidating Bargaining Units*, 19 VILL. L. REV. 885, 901 (1974).

76. See Note, *Finality and Fair Representation: Grievance Arbitration Is Not Final If the Union Has Breached Its Duty of Fair Representation*, 34 WASH. & LEE L. REV. 309, 325 (1977); Note, *Individual Control Over Personal Grievances Under Vaca v. Sipes*, 77 YALE L.J. 559, 562 (1968).

interests of the individual are more pronounced.⁷⁷ Industrial stability, for example, is not much affected by contrary positions in a grievance dispute, but it is greatly affected by an impasse in contract negotiations. Therefore, while it might be entirely proper to stress collective concerns when a contract is at stake, it is arguably appropriate to emphasize individual interests when a grievance is being processed.⁷⁸

B. Continuation of Arbitration

There are several "practical" reasons for allowing arbitration proceedings to continue in the face of allegations of union-management conspiracy. Uninterrupted arbitration is also supported by the policy notions of industrial self-government and arbitral absolutism announced in the *Steelworkers* line of cases.⁷⁹ This section will consider practicalities and policies supporting the continuation of arbitration.

One practical reason not to stay arbitral proceedings is that an award may issue that will satisfy the grievant. The grievant may simply be mistaken about the existence of a conspiracy between his union and his employer. Because the union has to work closely with management on a variety of matters, it may decline to assume a belligerent bargaining posture on the grievant's claim. Of course, the lack of belligerence does not necessarily indicate the existence of a conspiracy, but it may disappoint the grievant to the extent that he imagines one exists. Even if there is a conspiracy, it is conceivable that the arbitration award will satisfy the grievant. The arbitrator is rather free to structure his awards,⁸⁰ and his resolution may not reflect the wishes of either conspirator.

Another reason supporting continuation of arbitration is that it may make little economic sense to terminate an ongoing proceeding. Arbitration represents the last step in the process of resolving a grievance—it occurs when other efforts have failed. To suspend the dispute resolution process just before a decision is reached is wasteful, especially since the allegations of conspiracy

77. Though insofar as a particular dispute resolution establishes a precedent or a grievance arises out of a common occurrence, the interests of many others may be involved. See Cox, *supra* note 43, at 615.

78. The failure to recognize this distinction may lead to harsh results. See Note, *Finality and Fair Representation: Grievance Arbitration Is Not Final If the Union Has Breached Its Duty of Fair Representation*, 34 WASH. & LEE L. REV. 309, 325 (1977).

79. See notes 5-9 and accompanying text *supra*.

80. See generally Naffziger, note 6 *supra*.

may be untrue or unprovable. Rather than terminate nonjudicial efforts to resolve the dispute at this late stage, why not let them continue? After an arbitration award issues, a dissatisfied grievant could seek to upset it by alleging conspiracy and breach of the duty of fair representation. If these allegations prevail, he may have a judicial resolution of his claim. If they fail, there will already have been a determination of the issue.

Policy justifications for permitting arbitration to continue may be more important than practical ones. Recalling that the policy of preserving industrial stability depends in part on the union's prestige and support in the bargaining unit, it may be contended that a suspension of arbitration could adversely affect these interests by challenging the union's competence to represent members of the bargaining unit. Such a suspension could undermine the level of union support by communicating either that the bargaining agent is not to be trusted or that the grievance machinery is ineffectual. In extreme cases, diminished support for one bargaining agent might encourage employee unrest or recognitional rivalry among several unions. It could also deter management from cooperating with the union. This would undermine industrial stability.

Admittedly, the risk of industrial instability may not be particularly great in this context. Indeed, it might be observed that the risk actually extends both ways. If a grievant were unable to receive prompt and fair resolution of his claim due to a union-management conspiracy (or what he believed was one), his dissatisfaction could be infectious.

A stronger policy reason against permitting a stay of arbitration to issue upon an allegation of conspiracy is that intervening judicial supervision would tend to substitute a government decision for industrial self-determination—at least to the extent that the arbitration proceeding represents a choice of the collective parties. This policy in favor of industrial self-determination is the one so strongly emphasized in the arbitration context in *Steelworkers*. To upset the mechanism of industrial decisionmaking in its latter stages seems to denigrate the *Steelworkers* approach.

This argument is persuasive when there is in fact no conspiracy. If the allegations of conspiracy are true, however, the contention loses much of its force: Why should the courts defer to industrial self-government when that government is despotic? Of course, since there is no way to test the validity of the allegation without intervening in the arbitral process, it would seem best to defer to the arbitration procedure until an award is issued.

Mention should also be made here of the argument that individual interests, because they are more pronounced in grievance disputes, should permit arbitration to be stayed pending a judicial resolution of the conspiracy claim. This argument more closely approaches rhetoric than reality. There may be little need to worry about the inequity of supporting collective interests at the expense of individual ones, since continued arbitration may not be actually incompatible with individual interests. Indeed, it may be averred that continued arbitration both preserves the purity of the grievance machinery while it permits the individual to have eventual redress in the face of a conspiracy. This is possible because the arbitration award will be upset if the individual grievant can show grounds for vacation under section 10 of the Arbitration Act⁸¹ or can demonstrate that the union has breached its duty of fair representation.⁸² In view of the possibility of an arbitral upset, it can be maintained that the grievant alleging a conspiracy loses nothing more than a little time if the arbitration continues to an end. When the award is made, the grievant can then approach the court to have it vacated on appropriate grounds. If his conspiracy allegation has merit, it will permit him to have his day in court.⁸³

C. *Tripartite Arbitration*

One significant variation on the theme of continuing the arbitration despite an allegation of conspiracy is to include the grievant or his attorney in the arbitral proceeding. The *Michelson's* court spoke of this procedure as a means of protecting the interests of the grievant.⁸⁴ Whether or not such a procedure does protect the interests of the grievant is subject to some question. A further question may be raised about the propriety of introducing a third party into a contractually established arbitral proceeding.

Certainly the presence of the grievant or his attorney in the

81. See 9 U.S.C. § 10 (1970).

82. See *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); Comment, *Judicial Deference to Arbitral Determinations: Continuing Problems of Power and Finality*, 23 U.C.L.A. L. REV. 936, 956 n.117 (1976).

83. The force of this contention presumes a judicial willingness to upset an otherwise final arbitration award when the requisite grounds are established. While it has been observed that courts are resistant to upsetting awards for breach of the duty of fair representation, see Tobias, *supra* note 72, at 537, in the aftermath of *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976), it is likely that courts will be receptive to fair representation challenges to finality.

84. 545 F.2d at 1252.

arbitration hearings would seem to ensure that his side of the matter would be aired. It is conceivable, however, that this advantage would be outweighed by the disadvantages of the arrangement. For example, it is likely that in the context of a conspiracy charge the union would not be vigorous in asserting the grievant's position. Indeed, if the charges of conspiracy were true, the arbitral situation would resemble an action by a plaintiff against codefendants. Such an arbitration lineup may present difficulties for an arbitrator who is chosen by the collective parties, who is accustomed to dealing with the concerns of collective parties, and who may be adept at reaching compromises reflecting collective interests. It may be difficult for the arbitrator to be objective when the collective parties seem to be more or less on the same side of the issue.

It should be observed, of course, that such tripartite arbitration would not focus explicitly on the question of the union's breach of the duty of fair representation. Such a claim is not arbitrable under the contract between labor and management. But it is nevertheless probable that the conspiracy charges which justified the tripartite arrangement in the first place would at least muddy the arbitral waters and perhaps contribute to a plaintiff-codefendant scenario. It is conceivable, therefore, that the presence of the grievant or his attorney in the arbitration hearings will not result in a better outcome for the grievant. Indeed, it is possible that the ultimate outcome could be worse.

Although a grievant can attempt to upset an unfavorable arbitration award on the ground that the union breached its duty of fair representation, if the same claim is made following an arbitral proceeding in which the grievant represented his own interests, it may be difficult for a court to believe that a union's breach could have had any effect on the arbitrator's award. That is, the court may reason that since the grievant himself was allowed to represent his position, the arbitration award could not have been made without a fair consideration of the grievant's claim. Once a grievant enters into a tripartite arbitration proceeding, therefore, he may undercut the ultimate strength of his judicial position.

Perhaps developments like the ones just referred to are unlikely to materialize. It may well be that the benefits of including a grievant in arbitration hearings outweigh the potential risks. The risks are not so remote, however, that they should be overlooked.

A further question may be raised about the appropriateness of the tripartite arrangement. Is it proper to include what

amounts to a third party in the arbitration after it has begun? The question is a serious one because if, as has been judicially affirmed, the legitimacy of arbitration stems from the parties' contractual agreement,⁸⁵ it is arguable that the arbitrator's inclusion of a third party in the proceeding goes beyond the scope of the parties' agreement and therefore beyond the arbitrator's power.⁸⁶

Tripartite arbitration has been judicially approved in only a few circumstances. In *Transportation-Communication Employees Union v. Union Pacific Railroad*⁸⁷ and *Columbia Broadcasting System, Inc. v. American Recording & Broadcasting Association*,⁸⁸ tripartite arrangements were allowed that involved two unions and one employer where jurisdictional disputes had arisen between the unions. In these cases the contentions of the parties lent themselves well to tripartite arbitration.

Aside from *Michelson's*, no other case seems to have approved a tripartite arrangement in a nonjurisdictional context.⁸⁹ An earlier decision by the Ninth Circuit, however, did contain language to the effect that the question whether a grievance may be processed by a bargaining agent or by the grievant himself is a procedural matter and that procedural matters are left to the arbitrator's discretion. This case, *Association of Industrial Scientists v. Shell Development Co.*,⁹⁰ can be distinguished from the situation under consideration here because its focus was not on a tripartite procedure but rather on one in which either the grievant or his agent would take the field against management. Nevertheless, the "procedural" theory espoused in that case is applicable to the tripartite situation and was applied in *Michelson's*.⁹¹

In addition to the procedural argument for including an individual grievant in arbitration proceedings, it may be useful to

85. See *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578 (1960).

86. For a discussion emphasizing the advantages of including the grievant in arbitration proceedings, see Rosen, *The Individual Worker in Grievance Arbitration: Still Another Look at the Problem*, 24 Md. L. Rev. 233 (1964).

87. 385 U.S. 157 (1966).

88. 414 F.2d 1326 (2d Cir. 1969).

89. It should be noted that some commentators have seen in the Supreme Court's opinion in *Humphrey v. Moore*, 375 U.S. 335 (1964), a judicial sanction for tripartite arbitration. See, e.g., Rosen, *supra* note 86, at 292-93. The Ninth Circuit Court in *Michelson's* apparently agreed with these commentators, since it cited *Humphrey* for the proposition that the grievant could participate in the arbitration to protect his interests. 545 F.2d at 1252.

90. 348 F.2d 385, 389 (9th Cir. 1965).

91. 545 F.2d at 1252. The *Michelson's* court relied on *John Wiley & Sons v. Livingston*, 376 U.S. 543, 557 (1964), for the proposition that procedural questions could be decided by the arbitrator.

recall that the union is an agent for the grievant in his dispute.⁹² While admittedly the union may have more than the individual grievant's interests to pursue in a given arbitral proceeding,⁹³ it would not seem too outrageous from a legal standpoint to permit the "principal" to participate with his agent in the dispute resolution process.

In view of the judicial tendency to approve a tripartite arbitral arrangement in cases dealing with jurisdictional disputes between unions, and considering the "procedural" approach to the problem that has achieved judicial sanction, it seems to be legally appropriate for a court to countenance a tripartite procedure. But even though legally appropriate, such an arrangement is subject to the risk that an adverse arbitral award may be more difficult to upset when the grievant participates in the proceeding.

V. CONCLUSION: THE OUTCOME OF THE WEIGHING

The court in *Michelson's* was careful to limit its holding to the facts before it.⁹⁴ The court did not want to suggest that the approach it took should be a standard one. Perhaps a standard solution is impossible. Certainly as long as arbitrators are able to make significant "procedural" adjustments in their proceedings, it will not be a simple matter for courts to impose uniformity. And uniformity may not be advisable in any event—perhaps different solutions should be devised to deal with different situations.

A uniform approach, however, would have advantages. Certainty would be promoted by a standard solution, and certainty would contribute to industrial peace. A standard solution could also ensure that the interests of the individual grievant and the collective parties would be protected to some extent from discretionary treatment. Furthermore, the difficulty of fashioning unique remedies for unique fact situations could be alleviated if a remedy were devised that would apply well to all.

With these considerations in mind, and recalling the arguments for and against alternative solutions, uninterrupted arbitration should be the standard approach to the problem of conspiracy allegations arising at the arbitration stage of grievance

92. The Ninth Circuit pointed out in *Michelson's* that the union was the grievant's agent in making, performing, and enforcing the collective agreement. 545 F.2d at 1252.

93. See Note, *The Duty of Fair Representation and Exclusive Representation in Grievance Arbitration: The Duty of Fair Representation*, 27 SYRACUSE L. REV. 1199, 1211 (1976).

94. 545 F.2d at 1255. The qualification was: "We say nothing as to what our decision might be in a different case." *Id.*

proceedings. On balance, there seems to be little to lose and much to gain by having arbitration continue in the face of a conspiracy charge. The simple reason why is this: The justification for escaping exhaustion is also a justification for upsetting a "final" arbitral award, namely, that the union has breached its duty of fair representation. In other words, in order to achieve a judicial hearing of his claim, the grievant's hurdle is the same whether he wishes to abate the arbitral proceeding or upset an unsatisfactory award. Once a breach of the duty of fair representation is demonstrated, the court will hear the grievance. At this point, it makes no difference whether an arbitral award has been made or not—the court will decide the issue. But if a breach of the duty is not demonstrated after termination of arbitration, it makes a great difference, for there is no arbitral award existing to settle the dispute. Following the courtroom confrontation, there will have to be an arbitral resolution. And what would prevent the grievant from alleging a breach of the duty in a subsequent arbitration?

It should be recalled that a central theme of national labor policy is to encourage the nonjudicial resolution of disputes. That policy theme would suffer were a grievant able to take his case to court before the nonjudicial machinery could generate a result. The proposed solution permits the grievance machinery to function through to a conclusion. It also permits the grievant who is dissatisfied with the result to have a courtroom hearing if he can demonstrate that the union has breached its duty of fair representation.

The proposed solution will, of course, be an inconvenience to the grievant who can establish a breach of the union's duty—it will mean a minor delay of his judicial hearing. But it will not prevent his ultimate vindication. For the grievant who cannot demonstrate a breach of the duty, the delay may also be unattractive. But in that case, a final result will have been generated by the arbitration that will be determinative of the parties' rights. This result will be both efficient and supportive of national labor policy.

Tripartite arbitration should not be encouraged. The objective is not that it would be legally inappropriate to add a new party to the proceeding, but that it might work to the disadvantage of the grievant when an actual conspiracy does exist. It would probably be more difficult to upset an arbitral award on unfair representation grounds when the grievant has represented himself.

The proffered solution is an orthodox one from the stand-

point of the exhaustion of remedies doctrine. It provides that, once the arbitration stage of the grievance machinery is reached, the machinery should be allowed to function until a result is produced. It is conceivable, of course, that this result will not be a correct one. When the result is erroneous because there has been a conspiracy between the union and management, the correct result can only be reached if courts are willing to recognize the unfair representation exception to the finality rule and review the arbitral award. In the aftermath of the Supreme Court's decision in *Hines v. Anchor Motor Freight, Inc.*,⁹⁵ it is more likely than ever that the exception will be applied. Its application in this context will ensure that individual rights are safeguarded even as collective interests are upheld.

N. Gregory Smith

95. 424 U.S. 554 (1976). See text accompanying notes 12-13 *supra*.